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Charles R. Lawrence III

Georgetown University Law Center, lawrenc1@law.georgetown.edu

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Charles R. Lawrence III

Professor of Law
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Who Is the Child Left Behind?: The Racial Meaning of the New School Reform *

Charles R. Lawrence III[†]

I. INTRODUCTION

The headline reads, “Bush Marks School Law’s 2nd Anniversary: White House uses visit to announce budget increases.”¹ In the photograph just below the headline, George Bush is sitting on a wooden bench with three black children. On the blackboard behind them someone has printed the words “No Child Left Behind” with white chalk in large block letters. Many children have printed their own names in colorful chalk hues beside and beneath the large block letters. The President wears a dark blue suit and red tie for this photo opportunity and the three children are dressed in white tops and dark pants, apparently a school uniform. The caption beneath the photograph reads, “President Bush listens to Khadijah McCain at Laciende Elementary School in St. Louis, as schoolmates Damien Goolsby and Darlet Horton watch.” The lead paragraph of the piece says that the President visited St. Louis to celebrate the anniversary of one of his “signature domestic achievements” and to “trumpet two schools he believes have begun to live up to the promise of the No Child Left Behind Act.”²

Why am I offended by this warm, fuzzy photograph of the President with three cute schoolchildren? I ask myself whether it is just that I find George Bush offensive. Perhaps, regardless of the context, I cannot look at his smug face without thinking of everything he stands for, without remembering his bombs dropping on Afghanistan, the young men and women dying in Iraq while his buddies at Haliburton reap profits from the President’s \$150 billion

* This article is based on a speech that Professor Lawrence delivered on April 14, 2005, as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue’s accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

[†] Professor of Law, Georgetown University Law Center; B.A., Haverford College, 1965; J.D., Yale Law School, 1969. Loren L. AliKhan and Laura Ginns provided invaluable research assistance in preparing this speech for publication.

1. Eric W. Robelen, *Bush Marks School Law’s 2nd Anniversary*, EDUC. WK., Jan. 14, 2004, at 20.

2. *Id.*

war. But there is something more than Bush himself that is upsetting me here. I am offended by the racial text of this photograph as well as by the text of the larger discourse of which it is a part. The racial meaning of this text does more than offend me personally. It injures me, just as the Jim Crow signs on drinking fountains and bathrooms injured generations of black Americans. And it injures the beautiful children who have so generously welcomed the President into their classroom. It is a text with meaning that, like the meaning of segregation itself, injures us all.

In a recent Yale Law Journal Article, entitled *Forbidden Conversations: On Race, Privacy and Community*,³ I considered the phenomenon of white and middle-class black flight from urban public schools. I argued there that the injuries of stigma and exclusion from community identified in *Brown v. Board of Education*⁴ continue, as does our responsibility for those injuries, even as we reframe the causes of and remedies for educational inequality in terms of racially neutral private choice. Segregated schools achieve their racist purpose by building a wall between poor black and brown children and those of us with privilege, influence, and power. It does not matter that this wall is not built pursuant to the mandate of law or that it is created by the cumulative effect of our private choices. It is segregation nonetheless and it encourages us to hoard our wealth on one side of the wall while children on the other side are left with little. The genius of segregation as a tool of oppression is in the signal it sends to the oppressor—that our hoarding of resources is O.K., and in the lesson it teaches—that there is no need for sharing, no moral requirement for empathy and care.

This afternoon I return to this theme in a different, while related, context through an examination of the No Child Left Behind Act (Act or NCLB).⁵ I will argue that, while the Act's stated goals are laudable, its conception, implementation, and the social meaning revealed by the discourse and rhetoric it has spawned, perpetuate and exacerbate the injuries inflicted upon poor black and brown children by segregation, racism, and poverty. It is not coincidence when the President chooses a black school as the backdrop for his celebration of NCLB. For while the Act applies to all public schools, its most important provisions focus on the segregated schools attended by poor black and brown children and on the persistent racial achievement gap between these children and their white and Asian peers.⁶ When African-American and Latino children

3. Charles R. Lawrence, III, *Forbidden Conversations: On Race Privacy and Community (A Continuing conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353 (2005).

4. 347 U.S. 483 (1954).

5. 107 Pub. L. No. 110, 115 Stat. 1425 (2002).

6. Promising on its title page to "close" the achievement gap, the Act makes this goal an explicit part of federal policy for the first time in history. See Press Release, Rod Paige, Secretary of Education, U.S. Dept. of Educ., Paige Cites Progress in Black Education But Notes Achievement Gap has Widened Over Past Two Decades (Nov. 19, 2005), at <http://www.ed.gov/news/pressreleases/2003/10/10142003b.html>; Ronald F. Ferguson, *Addressing Racial Disparities in High-Achieving Suburban Schools*, NCREL POLICY ISSUES, Dec.

finish fourth grade, they are two years behind their white and Asian classmates according to nationally-normed tests. By the time they hit the eighth grade they are three years behind; and as they reach the twelfth grade they are performing at the same level as white and Asian eighth graders.⁷ The Act's core strategy—of standards, testing, and accountability—focuses on these left behind children of color and on the teachers and administrators who are perceived to be responsible for their failure. In a speech before a conservative audience at the American Enterprise Institute, Secretary of Education Rod Paige made explicit the Act's racial text, invoking the legacy of *Brown v. Board of Education*, to respond to NCLB's critics: "But those who fought *Brown* were on the wrong side of history," he said, "just like those who fight No Child Left Behind will be judged so."⁸

The Act's proponents claim compassion, care, and concern for poor children. It is a conservative hard-nosed compassion to be sure, they say.⁹ They will not allow liberal do-gooders to make excuses while lazy, incompetent, uncaring teachers and administrators continue to fail these children. They will take names and kick ass. They will test, hold folks accountable, close schools, create transparency, and liberate children from failing public schools. When those public schools fail they will give the kids vouchers and bring in their buddies from the corporate world to rebuild a new privately owned system. Using language that echoes its macho "Bring 'em on" foreign policy rhetoric, the Bush Administration has taken a "you're either with us or against us" stance on NCLB by saying it will hold school administrators

2002, at 10 (discussing targeted efforts to close achievement gap for black and Hispanic students).

7. See The Education Trust, *Achievement in America*, 22–23 (2003) [hereinafter The Education Trust, *Achievement*], available at <http://www2.edtrust.org/NR/rdonlyres/14FB5D33-31EF-4A9C-B55F-33184998BDD8/0/masterach2003.ppt>. There are racially correlated gaps in almost every area of academic achievement, including grades, test scores, retention and dropout rates, graduation rates, identification for special education and gifted programs, extracurricular and co-curricular involvement, and discipline rates. Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS. C. REC. 6, 1052–53 (2003). Applying the statistics to a hypothetical group of 100 kindergarten students from each race illustrates the point. For every 100 white kindergartners, ninety-three will graduate high school by age twenty-nine, sixty-five will complete at least some college, and thirty-three will earn a bachelor's degree. The Education Trust, *Achievement*, *supra*, at 41. On the other hand, for every 100 African-American kindergartners who reach age twenty-nine, eighty-seven will graduate high school, fifty will complete some college, and only eighteen will have earned at least a bachelor's degree. The Education Trust, *Achievement*, *supra*, at 42.

8. U.S. Sec'y of Educ. Rod Paige, Remarks of Secretary Paige at the American Enterprise Institute (Jan. 7, 2004) (defending NCLB), at <http://www.ed.gov/news/speeches/2004/01/01072004.html>.

[T]he *No Child Left Behind Act* is the next logical step to *Brown*. It addresses the latent segregation, de facto apartheid, that's emerging in some of our educational settings. Like *Brown*, *No Child Left Behind* faced resistance. But if we have the will this law will have a powerful and healing impact on our society.

Id.

9. See *id.* ("No Child Left Behind is a rough law, but it is a good law.").

and teachers responsible and insist on results. Secretary Paige called the National Education Association, one of the nation's largest teacher's unions, a "terrorist organization" and then quickly recanted when teachers across the nation expressed their shock.¹⁰

II. THE ACT EXPLAINED AND AN INTERNAL CRITIQUE

Although I am sure that many of you are already familiar with the basic provisions of the Act, I should begin with some background so that we are all on the same page. A bipartisan Congress passed the Act, which was signed by the President in January 2002. The Act is sweeping in its aims and provisions. It contains over 750 pages of law and 1500 pages of regulations. The table of contents alone is 29 pages. Three years after its passage, many school districts are just beginning to understand its many implications and effects. More than ninety percent of America's school districts receive funding for more than forty federal educational and supportive services programs covered by the Act. The Act includes provisions on such matters as teaching reading, family literacy, delinquency, dropout prevention, teacher training, teaching traditional American history, language instruction for immigrant students, charter schools, counseling programs, women's equity, school prayer, and access to schools by military recruiters.

The main focus of NCLB, however, is to improve the academic achievement of students in low performing schools, and the most important provisions of the Act pertain to those schools that receive federal funds targeted for low-income children (Title I Schools and School Districts).¹¹ The Act's core strategy requires the states to adopt a specific approach to standards, testing, and accountability.¹² States must adopt federally approved standards in reading and mathematics, annual testing for all students in grades 3–8, and annual statewide progress objectives ensuring that all groups of students reach proficiency within twelve years.¹³ Assessment results and state progress objectives must be broken out by poverty, race ethnicity, disability, and limited English proficiency.¹⁴ The test results hold educators, schools, districts, and students accountable for academic achievement. The Act creates a set of sanctions for

10. Robert Pear, *Education Chief Calls Union "Terrorist," then Recants*, N.Y. TIMES, Feb. 24, 2004, at A20. "After his remark began circulating, Mr. Paige issued a statement saying . . . [that] '[I]t was an inappropriate choice of words to describe the obstructionist scare tactics that the N.E.A.'s Washington lobbyist employed against No Child Left Behind's historic education reforms.'" *Id.*

11. See 20 U.S.C. § 6315 (Supp. III 2003).

12. See 20 U.S.C.A. § 6311(a)–(b) (West Supp. 2005).

13. See 20 U.S.C.A. § 6311(b) (West Supp. 2005). See generally Stand Karp, *Let Them Eat Tests: NCLB and Federal Education Policy*, RETHINKING SCH. ONLINE, (discussing mandatory testing under NCLB), at http://www.rethinkingschools.org/special_reports/bushplan/Eat164.shtml.

14. See generally U.S. Dept. of Educ., *Stronger Accountability: Questions and Answers on No Child Left Behind*, [hereinafter *Stronger Accountability*] (describing data collection methods for school reports cards), available at <http://www.ed.gov/nclb/accountability/schools/accountability.html>.

schools that do not meet annual test performance objectives.¹⁵ After two years of failure, technical assistance is given, and an option is created for students to transfer to another public school in the district.¹⁶ After three years, students have the option to use their share of Title I funds to pay for tutoring or supplemental schooling from a state-approved outside group, such as a for-profit company or non-profit entity.¹⁷ In the fourth year, the failing school must change its staffing.¹⁸ In the fifth year, it must change its governance—for example, by converting to a charter school, turning itself over to a private management company, or allowing the state to take it over.¹⁹ The Act creates a significantly intrusive role for the federal government in elementary and secondary education, an activity traditionally reserved for local government and the state.²⁰

In a balanced and insightful analysis of the NCLB Act, Thomas Sobol, the Christian A. Johnson Professor of Outstanding Educational Practice at Teachers College, Columbia University, and former State Commissioner of Education for the State of New York, notes the widespread bipartisan support for the Act at its inception. He attributes the support to the almost universal agreement with its core goals of raising achievement and eliminating the achievement gap, and to the Act's commitment to achieving those goals through standards, testing, and accountability. Sobol explains,

[high standards] can promote *clarity* of purpose [giving us] a more specific understanding of what students should come to know and be able to do We require “three years” of math, but we don’t spell out what three years of math means. How do we know when English 9 is over? Because it’s June, that’s how. We should do better than that, [and standards can help us].²¹

Standards can also provide greater *quality* and *equity* of purpose. No more “selling our students short by not demanding enough of them. . . . No more dual systems [with] first class standards for” students in well off suburbs and lower standards for the urban poor.²²

15. *Id.* (outlining Act’s action plan and time table of sanctions for schools failing to improve).

16. *Id.*

17. *Id.*

18. *Stronger Accountability*, *supra* note 14.

19. *Id.*

20. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”). As recently as 1996, Republicans called for the eradication of the federal Department of Education. *See* Veronique de Rugy & Marie Gryphon, *Elimination Lost: What Happened to Abolishing the Department of Education*, CATO INST., Feb. 11, 2004, at <http://www.cato.org/research/articles/gryphon-040211.html>.

21. Thomas Sobol, Lecture Delivered at Teachers College Columbia University 6 (Nov. 5, 2003) (On file with author).

22. *Id.*

Sobol believes in standards, as do I. He also believes that tests can give us helpful information about how students are doing and that all of us should be held accountable for meeting our responsibilities in educating children. And I will say amen to that too. Sobol suggests, “[t]he question is not whether we should have standards, testing, and accountability. The question is what kind of standards, testing and accountability shall we have? And that’s where the rub is.”²³

Sobol identifies three problems concerning the Act’s unassailable purposes and methods. He calls them start-up problems, implementation problems, and conceptual problems, which he says arise “from the Act’s limited understanding of teaching and learning.”²⁴

Start-up problems are inevitable in any major undertaking.²⁵ NCLB start-up problems have been numerous and their detrimental impact on the lives of thousands of children is far from trivial. But start-up problems are not a reason for criticizing the essence of the program. The Act’s implementation problems are more critical. The Bush Administration has provided nowhere near the needed financial resources for this undertaking. In 2004, appropriations for NCLB fell \$8 billion short of what the bill authorized. Representative Dick Gephardt, who voted for the measure, explained, “[w]e were all suckered into it. It’s a fraud.”²⁶

Studies indicate that the states’ costs of meeting NCLB requirements are far exceeding the money the federal government is providing.²⁷ A report published in the first year of the law’s implementation found that in seven of ten states surveyed, school spending would have to increase twenty-four percent to comply with all the requirements of NCLB.²⁸ Texas, the largest state studied, would have to spend \$6.9 billion more, roughly doubling the state’s school budget.²⁹

The Act’s inattention to developing needed professional aptitude is a further flaw in implementation, as is its lack of understanding of the time such development requires. Most teachers want to succeed, but they need time and support to acquire the new skills, knowledge, and habits that they need in order to achieve the Act’s ambitious agenda. The Act assumes “that teachers know perfectly well what to do and how to do it, but for some perverse reason resist doing so.”³⁰ The Act treats schools as if they were fast food establishments

23. *Id.* at 7.

24. *Id.* at 9.

25. See Lynn Olson, *States Seek Federal OK For Revisions*, EDUC. WK., May 5, 2004, at 1, 31 (noting over forty states asked Department of Education for revised NCLB accountability plans).

26. See Peter Schrag, *Bush’s Education Fraud*, AM. PROSPECT, Feb. 2004, available at <http://www.prospect.org/print/V15/2/schrag-p.html>.

27. *Id.*

28. *Id.* (relying on frequently cited report of William J. Mathis).

29. *Id.* (citing Mathis report).

30. Sobol, *supra* note 22, at 10-11.

where you could measure progress by monthly increments in the number of burgers sold.³¹

[But education] is episodic, re-cycling and cumulative . . . We teach not only by imparting but by cultivating the strength that unfolds from within, and sometimes the unfolding can't be hurried . . . Educating children is like nurturing a garden; things need to be tended steadily and slowly, and it doesn't help to pull them up by the roots and measure them too often.³²

Professor Sobol sees the Act's conceptual problems as most telling. They include: (1) "dumbing down the curriculum"—limiting what we teach to the skills and knowledge we can easily measure and pushing teachers to focus on memorizing information and regurgitating facts for high test scores, rather than on teaching students to be thinkers who can make sense of that they are learning;³³ (2) "fossilizing an obsolete curriculum"—in the name of reform, the standards movement "is freezing in bureaucratic place the worst aspects of traditional education, . . . reward[ing] school people not for creativity but compliance;"³⁴ (3) "confus[ing] standards with standardization"—imposing a stifling uniformity of practice by allowing new testing programs to define precisely and completely what is to be taught, how it is to be taught, and how it is to be measured;³⁵ (4) mandating high stakes testing—students' futures should not "depend upon a single high-stakes test. . . [they] should have many different ways to show their learning;"³⁶ (5) believing "that the sole purpose of education is academic achievement"—good test scores are not all that matters.³⁷ Education is also about self-identity, creativity, community and justice; and (6) failing to give all students an equal opportunity to learn—the same access to well-trained teachers, appropriate curricula, and up-to-date learning material.³⁸

III. "IT'S THE SAME OLD SONG": NO CHILD LEFT BEHIND AS THE REPRODUCTION OF INEQUALITY

Thomas Sobol's analysis of the No Child Left Behind Act provides a thoughtful appraisal of the Act as a neutral instrument of educational policy. Sobol accepts the Act's stated goals at face value and critiques its implementation and conceptual premises as the errors of policy makers whose

31. *Id.* at 11.

32. *Id.*

33. *Id.* at 12.

34. Sobol, *supra* note 22, at 13-14.

35. *Id.* at 14.

36. *Id.* at 15.

37. *Id.* at 16.

38. Sobol, *supra* note 22, at 15.

lack of understanding, expertise, experience, or judgment has led them to wrong conclusions or actions.³⁹

I want to consider a more fundamental critique of the No Child Left Behind Act. This critique argues that the No Child Left Behind Act is not simply an ill-conceived and implemented effort in pursuit of good ends. Rather, the Act does affirmative harm by diverting our attention and our resources away from the continuing substantive and structural inequities of race and class, and by perpetuating and reinforcing social class hierarchies and racist beliefs and practices that continue to deny poor, working-class black and brown children equal educational opportunity and human dignity.

A. A History Erased and a New Story Told

The No Child Left Behind Act achieves its greatest injury by erasing the history and conditions that have caused the achievement gap it ostensibly seeks to close. The Act speaks often of race, requiring schools to keep separate data by ethnicity and holding schools accountable for improving the test scores of non-white students.⁴⁰ But nowhere does it speak of ending racism or dismantling segregation. The Act's proponents deplore the disproportionate injury that American schools inflict upon poor black and brown children, but accept no responsibility for that injury. Much less do they concede the injury's origin in our nation's deep divisions between white and black, rich and poor. To listen to the discourse on No Child Left Behind is to hear a story of failing schools without a history—a history of segregation, of inadequate funding, of white flight, of neglect, of eyes averted and uncaring while the savage inequalities of American education grew ever wider.

The revised account builds on the myth of formal equality:⁴¹ It is the story told by federal courts, where school districts are declared unitary while black children attend schools with no white classmate; where there is no inequity even when some children go to schools with broken toilets and leaky roofs while others learn on campuses with state-of-the-art science labs and Olympic size swimming pools; where segregated suburbs, havens for white flight, have no responsibility for the segregation in their own schools or in the city schools that are their neighbors. The law's name itself, borrowed (stolen, some would say) from the rallying cry, "Leave No Child Behind," a longtime slogan of Marion Wright Edleman's Children's Defense Fund, signals the new story's theme. "We are the champions of poor black children," say Bush, Paige and

39. See generally *id.*

40. See 20 U.S.C. § 6311(h)(1)(C)(i) (Supp. III 2003) (requiring schools to report on student achievement disaggregated by identity groups, most notably, race).

41. See Charles R. Lawrence, III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 822–28 (1995) (comparing formal equality and transformative equality); see also Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1411–13 (1990) (describing formal/substantive equality dichotomy in terms of perpetrator and victim perspectives).

Co., at once claiming the mantel of liberator and denying any role in these children's oppression.

Even as we argue over the Act's benefits and faults, this erasure of history causes us to forget the deep structures of inequality that remain in place. *Brown v. Board of Education* recognized in segregation a system designed for oppression—designed to give some children less and others more, designed to teach some children they are worthless while others learn self-worth, designed to withhold knowledge from some while others are given the keys to life-long learning, to prepare some children to serve while others are prepared to rule. We are segregated still, by race and by class, and segregation still achieves its purposes well. Can No Child Left Behind claim to be about equality without dismantling segregation, a system designed for inequality? I think not. But that is exactly the claim it makes. And as we argue over the details of policy and implementation of the Act, we turn our attention away from the more fundamental harm that segregation does.

Jonathan Kozol, in his book *Savage Inequalities*, documented the vast differences in resources available to children in rich and poor school districts and their impact on the lives of children. In a passage describing variances in funding of New York City area schools, he says:

There is a certain grim aesthetic in the almost perfect upward scaling of expenditures from poorest to poor to richest of the rich within the New York City area: \$5,590 [per child] for the children of the Bronx and Harlem, \$6,340 for the non-white kids of Roosevelt, \$6,400 for the black kids of Mount Vernon, \$7,400 for the slightly better-off community of Yonkers, over \$11,000 for the very lucky children on Manhasset, Jericho and Great Neck. In an ethical society, where money was apportioned in accord with need, these scalings would run almost in precise reverse.⁴²

Little has changed since 1990 when Kozol wrote this passage. Since the early 1970s, more than thirty state supreme court decisions have been issued in school finance cases.⁴³ In about half of these cases, the courts found the unequal and inadequate funding of poor school districts within their state to violate state constitutional provisions guaranteeing equal and appropriate education to all the state's children.⁴⁴ Only last year, New York's highest court held that poor children in New York City schools were not receiving the minimally adequate education and ordered the state to increase that city's

42. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS*, 122–23 (1991).

43. See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 606 (Mass. 1993); *Campaign for Fiscal Equity, Inc., v. New York*, 801 N.E.2d 326, 331–32 (N.Y. 2003).

44. See *Rose*, 790 S.W.2d at 212 (finding funding system unconstitutional and inadequate).

education funds.⁴⁵ But NCLB does nothing to equalize funding between wealthy and poor school districts. Rather, its scheme of accountability and sanctions reinforces these disparities, further burdening poor school districts with the costs of new federal mandates while providing no opportunity for resource sharing or reallocation between districts.

The Act purports to guarantee a way out for children trapped in failing schools by giving them the right to transfer to another school that has not failed. But this choice is limited to schools within the same school district. And where the entire district is resource-poor, as is most often the case, the choices are few or none, often meaning over an hour's ride to a school that is barely better than the one the child has escaped. In Chicago, 19,000 children applied for transfers and only 1,100 were approved because there simply was not enough room in district schools.⁴⁶ In Los Angeles, where tens of thousands were eligible, there were only 229 transfers.⁴⁷ In New York, the school district granted all 8,000 transfer requests contributing to the worst overcrowding in the city's schools in years.⁴⁸ About a third of the 8,000 transfers were moved from one school labeled failing under the law to another failing school.⁴⁹ Schools that have struggled to improve and barely meet the Act's improvement goals are now faced with ballooning class sizes sure to drive them below the failing mark next year. At Booker T. Washington Middle School, on the upper west side of Manhattan, class size swelled to over forty. A New York Times reporter describes the scene during the second week of school:

Rachel Pinsen, a seventh-grade teacher, has 42 students. "I'm sorry, I know how hot you are crowded like this . . . I don't have enough books either. You have to share." She started with 32 students, and the federal transfers just kept coming Roby Block, a science teacher, did not have laboratory materials for 9 of her 41 students. Alex Bleeker did not have computer terminals for 12 of his 42 students. "The 12 sit out," he said. "It's like study hall for them. But

45. See *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 348. In 2005, state supreme court Justice DeGrasse ordered the State of New York to provide New York City public schools with an additional \$5.63 billion. See *Campaign for Fiscal Equity v. New York*, Index No. 111070/93, at 4 (Mar. 16, 2005), available at <http://www.cfequity.org/compliance/degrassefinalorder031505.pdf>.

46. In April of 2004, the Chicago school district was preparing to send letters to the families of 175,000 students regarding their eligibility to transfer out of their low performing schools. But the district had fewer than 500 slots available in 20 schools. See Erik W. Robelen, *Chicago Data Suggest Transfer Students Gain*, EDUC. WK., May 5, 2004, at 6.

47. See Lisa Snell, *No Way Out: The No Child Left Behind Act Provides Only the Illusion of School Choice*, REASON, Oct. 2004, at 34-39.

48. Elissa Gootman, *Schools Seeking Alternatives to Granting More Transfers*, N.Y. TIMES, Sept. 30, 2003, at A1. By October of 2004, fewer than 5,000 schoolchildren sought transfers out of failing schools. See Elissa Gootman, *Fewer Students Seek Transfers to Better Schools*, N.Y. TIMES, Oct. 15, 2004, at B3 [hereinafter *Students Seek Transfers*].

49. See *Students Seek Transfers*, *supra* note 48, at B3 (noting transfers cause overcrowding and stress on schools).

it causes problems. The 12 not doing anything want to run around. They distract the rest. It's hard to get anything done."⁵⁰

At Booker T., the gifted classes—mainly white children of professional and middle class parents—are exempt from receiving transfers, but not the Dr. Charles Drew School, a program within the school intended for minority children who are academically talented but unable to pass the screening for the gifted classes.⁵¹ The two sixth grade classes in Charles Drew started with thirty-two students each (virtually all black and Hispanic) and, thanks to No Child Left Behind transfers, ballooned to forty-three and forty-one.⁵² “Ms. Williams, who teaches literacy, has students reading on an eighth grade level and transfers who cannot write a sentence.”⁵³

Judy Garcia’s child, a NCLB transfer student, travels ninety minutes by public transportation from the far northern Bronx to I.S. 89 in far southern Manhattan. The Garcia’s live near the border of Westchester County, where the school district boasts some of the richest schools and smallest class sizes in the nation.⁵⁴ A short trip to the north would make more sense but that would mean taking on the fundamental inequality of our system and No Child Left Behind does anything but that.

“Who is the child left behind?” my title asks. She is black and poor. He goes to a segregated school. Her family lives, along with thirty-five million other American families, below the poverty line. Her mother received no prenatal care. The paint and pipes of slum housing have poisoned him with lead. She wolfs down her free school breakfast because it’s the first meal she’s eaten since she left school the day before. His father is in prison. She comes to school in snow without a coat.

Of course the children covered by the Act’s provisions are not all black and poor. The Act defines the child it protects by the failure of the school that he attends. These children are black and brown, Asian and white. They live in high-rise housing projects, in sharecroppers’ shacks, and in suburban subdivisions. During its first two years, NCLB caught more American schools in its net than anyone would have imagined. In Florida, eighty-seven percent of schools failed to meet their Average Yearly Progress goals. In Delaware, fifty-seven percent of public schools failed to meet the NCLB benchmarks.⁵⁵

50. Michael Winierip, *On Front Lines, Casualties Are Tied to New U.S. Law*, N.Y. TIMES, Sept. 24, 2003, at B9.

51. *Id.*

52. *Id.*

53. *Id.*

54. Michael Winierip, *No Child Left Behind Leaves No Room for Some*, N.Y. TIMES, Sept. 10, 2003, at B7.

55. See Eric W. Robelen, *State Reports on Progress Vary Widely*, EDUC. WK., Sept. 3, 2003, at 1 (citing Florida and Delaware statistics); see also EDUC. COMM’N OF THE STATES REPORT TO THE NATION: ACCOUNTABILITY AYP 17-32 (2004) (reporting adequate yearly progress of states under NCLB), available at

However, when I say the child left behind is black and poor, I speak of a deeper truth—truth the Act’s ubiquity hides. This truth has two parts. The first is the real world of children assaulted, wounded, and dying from the structural conditions of hyper-segregation and poverty in a nation still deeply divided by race and class. The child I have described is found among the data that support the findings of a recent Educational Testing Service (ETS) study on the underlying causes of the achievement gap. This study found that birth weight, lead poisoning, hunger and nutrition, reading to young children, television watching, parent availability, parent participation, and student mobility were all factors beyond the walls of the school that contribute significantly to the racial achievement gap.⁵⁶

The second part of this truth refers to the meaning that we give to and take from the Act and from our discourse, or the way we talk about it. When I say this child is black and poor, I refer to the picture painted by the Act and captured in the President’s St Louis photo opportunity. The benevolent white President visits the black school to celebrate No Child Left Behind’s second anniversary. When I teach my students about unconscious racism, I ask them to think about words such as *standards*, *assessment*, *accountability*, and *achievement gap* and picture the people who are being talked about. Who is not up to standard? Who needs to be tested? Who are the students and teachers at failing schools? Who needs to be held accountable? Who sits at the bottom of the achievement gap? In a LEXIS search using the database “News, Most Recent Two Years” and the terms and connectors, (“No Child Left Behind” or “NCLB”) and (“African American children” or “African American students” or “black children” or “black students”) LEXIS identified 908 articles. Using the same database and the terms (“No Child Left Behind” or “NCLB”) and (“African American” or black) the message from LEXIS that said “More Than 3,000 Results. Edit search terms and try again.” In this picture all underachievers become black and brown even as the conditions causing their underachievement are erased.

The inequalities conceived in slavery and Jim Crow are revived and reinforced at the intersection of these two stories—the first story, the history of America’s ever vital racism, erased and replaced with the second, formal equality’s tale of white innocence, echoing time honored racist stories and

http://www.ecs.org/html/Special/NCLB/ReportToTheNation/docs/Indicator_2.pdf.

56. Paul E. Barton, *PARSING THE ACHIEVEMENT GAP: BASELINES FOR TRACKING PROGRESS* (2003), available at <http://www.ets.org/Media/Research/pdf/PICPARSING.pdf>; see, e.g., John M. Flora, *High Mobility Linked to Low Test Scores*, INDIANAPOLIS STAR, Mar. 4, 1999, at N1 (linking high levels of student mobility common to underprivileged youth and lower test scores); Marge Christensen Gould & Herman Gould, *A Clear Vision for Equity and Opportunity: Diagnosis and Treatment of Vision Disorders in Poor Children Improves Academic Achievement*, 85 PHI DELTA KAPPAN 4, 324 (2003) (discussing high rate of undiagnosed vision problems among impoverished children); Richard Rothstein, *Social Class Leaves Its Imprint*, EDUC. WK., May 19, 2004 (discussing the effects of health problems, housing issues, and economic security on student performance).

beliefs about blacks and other outsiders, made black to facilitate their oppression. We accept the substantive conditions of inequality by acting as if we have achieved equality already, as if we are not implicated in this injury, and then we blame the victims—the failing schools, the teachers, the parents, the communities and cultures from which they come, and ultimately the children themselves. Once more we offer separate and unequal education, and this time, with a con artist's guile and deceit, we offer it as remedy, as a solution to itself.

B. Race, Class and the Hidden Curriculum of No Child Left Behind

The brick school building was once the black high school when Fort Worth schools were segregated. Now, the student population at Terrell Elementary is integrated, at least in name—still mostly black, with a trickling of Hispanics, Asians, and whites. In another way, the school is more segregated than ever: All the students are poor.

In a fourth grade class students sit in a semicircle around their teacher, and chant out letter sounds, words and answers to questions in unison. “Read, spell, read!” the teacher says, snapping her fingers as she says each word. And the students read the word, chanting in unison—“carpet”—they spell it—“c-a-r-p-e-t”—then they chant it again, louder than the first time—“carpet!”⁵⁷

In a fifth grade classroom across the hall a young second year teacher leads the class in a reading comprehension exercise. It is nearly as fast paced as the phonics lesson. Students read short passages and are repeatedly prompted to mine facts and define vocabulary words. The teacher comes to a passage where the word “drain” appears.

“The part of a sink that the water goes down is called a drain,” she says, reading the prescribed words for the teacher printed in blue in her instruction book and prompting her students, by pounding her marker against the book.

They repeat: “The part of a sink that the water goes down is called a drain.”

She then asks: “What is the part of a sink that the water goes down?”

“A drain!” they chant in unison.⁵⁸

Across the nation, in school districts serving poor minority children, there are classrooms that look and sound like these. The reading program used at Terrell is a whole school model called Direct Instruction. The No Child Left Behind Act's standards, testing, accountability model, and the pressure it puts on schools to show quick results have created a lucrative market for a high-profile education reform industry that produces and sells “comprehensive,” “replicable,” “research based,” “whole school” models of curriculum and instruction. (The adjectives are not mine. They come from the industry's

57. Michael Sokolove, *True or False?*, WASH. POST, Feb. 24, 2002, at W18 (Magazine).

58. *Id.*

websites.) These comprehensive school reform models promise “alternatives for improving the effectiveness of underperforming schools serving high concentrations of at-risk students.”⁵⁹ What do you think these “at risk students” look like?

In 1997, Congress appropriated \$150 million to permit high poverty schools to adopt a reform model from a list of eighteen approved models. More recently, the Bush Administration has offered \$900 million in federal funds to school districts that choose and implement whole school models that contain reading programs that meet with the approval of the Department of Education. Both the Reading First program (\$5 billion over six years) and No Child Left Behind require school systems to adopt standards, aligned curricula, and annual standardized tests that meet federal regulations. Adopting an approved comprehensive school model makes this easy. The Act gives significant financial incentives to adopt one of these models to upwards of 20,000 high-poverty Title I schools.⁶⁰

The curricula in most of these models call for minutely choreographed classes. Large portions of class time are devoted to fast-paced teacher-directed instruction, punctuated by rhythmic choral-group and individual student response. Over the course of a day the teacher may ask 300 or more questions. Teachers read from scripts that dictate not only the content to be learned and how that content will be taught, but even the specific words to be used.⁶¹ Repetition is stressed so that skills become automatic. The reading programs provide books with phonetically regular vocabularies so that children do not stumble over exceptions to the rules they learn.

My purpose here is not to critique particular programs or debate the efficacy of different methods of instruction (phonics versus whole language, back to basics versus progressive). Rather, I want to make a larger point about the continuing segregation in American education. Not only do we teach children in different schools, separated by race, class, and how much money we spend; we also *teach* them differently. We offer different content, we speak to them differently, and we listen differently, too. We have different expectations,

59. Jennifer King Rice, *Making Economically Grounded Decisions About Comprehensive School Reform Models: Consideration of Costs, Effects, and Contexts*, in EFFICIENCY, ACCOUNTABILITY AND EQUITY ISSUES IN TITLE I SCHOOLWIDE PROGRAM IMPLEMENTATION 29-30 (Kenneth K. Wong & Margaret C. Wang, eds., 2002). The author is grateful to Jennifer Ryan, J.D. 2004, at Georgetown Law for her research paper, *Comprehensive School Reform: Perpetuating Inequality, Stereotypes, and Stigma?* (on file with author), which provides a thorough analysis of these issues.

60. See SUSAN BODILLY, *NEW AMERICAN SCHOOLS' CONCEPT OF BREAK THE MOLD DESIGNS: HOW DESIGNS EVOLVED AND WHY 2* (2001).

61. See JAMES TRAUB, *BETTER BY DESIGN? A CONSUMER'S GUIDE TO SCHOOLWIDE REFORM* 37 (The Thomas B. Fordham Foundation ed., 1999). Direct Instruction calls for “[p]opular value of teacher creativity and autonomy as high priorities [to] . . . give way to a willingness to follow certain carefully prescribed instructional practices.” See National Institute for Direct Instruction, at <http://www.nifdi.org/defaultcontents.htm>.

aspirations, and goals. We are educating them for different futures. We send them different messages about their value to us, to the world, and to themselves.

Scholars in political economy and the sociology of knowledge, including Bowles and Gintis, Basil Bernstein, and Michael Apple, have observed that schools in complex industrial societies like our own make available different types of educational experience, curriculum and knowledge to students from different social classes. Knowledge and skills leading to social power and reward are taught to advantaged social groups but are withheld from the working class and poor. Students from different social class backgrounds are rewarded for classroom behavior that corresponds to their presumed future stations in the economy and social hierarchy—the working classes for docility and obedience, the managerial classes for initiative and personal assertiveness.⁶² In an ethnographic study, Jean Anyon examined the curricular, pedagogical, and pupil evaluation practices employed at five elementary schools in the same public school district serving working class, middle class, and affluent/elite populations.⁶³ She observed striking examples of the “hidden curriculum,” hypothesized in the earlier theoretical work,⁶⁴ that provide insight into the hidden injuries of “No Child Left Behind.”

In each school, Anyon looked at students’ relation to persons and types of authority regarding schoolwork, and at students’ relation to their own productive activity.⁶⁵ In the two working class schools she found that school work involved following directions and was usually mechanical, involving rote behavior and very little decision making.⁶⁶ Most of the rules are designations of what the children are to do; the rules are steps to follow. The steps are told to the children by the teachers and are often written on the board. The children are told to copy the steps in their notebooks.⁶⁷ Rote behavior was often called for in oral classroom work. Here is a passage from Anyon’s notes:

When going over math and language arts sheets . . . as the teacher asked for the answer to each problem, he fired the questions rapidly, staccato, and the scene reminded the observer of a sergeant drilling recruits: above all, the questions demanded that you stay at attention: “The next one? What do I put here? Here? Give us the next.” . . . The (four) fifth grade teachers observed in the

62. See generally MICHAEL W. APPLE, *IDEOLOGY AND CURRICULUM* (1979); BASIL B. BERNSTEIN, *CLASS, CODES, AND CONTROL, TOWARDS A THEORY OF EDUCATIONAL TRANSMISSION* (1977); SAMUEL BOWELS AND HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE* (1976).

63. Jean Anyon, *Social Class and the Hidden Curriculum of Work*, 162 J. EDUC. 67, 71-76 (1980).

64. *Id.* at 68 (suggesting “hidden curriculum” based on social class exists in classrooms and impacts education).

65. *Id.* at 70 (explaining series of relationships creating one’s social class).

66. *Id.* at 73.

67. Anyon, *supra* note 63, at 73.

working-class schools attempted to control classroom time and space by making decisions without consulting the children and without explaining the basis for their decisions. The teacher's control thus often seemed capricious. . . . The children had no access to materials. These were handed out by teachers and closely guarded. Things in the room "belonged" to the teacher: "Bob, bring me my garbage can." The teachers continually gave the children orders. Only three times did [I] hear a teacher in either working-class school preface a directive with an unsarcastic "please" or "let's" or "would you." Instead, the teachers said, "Shut up," "Shut your mouth," "Open your books," "Throw your gum away—if you want to rot your teeth, do it on your own time."⁶⁸

Contrast this scene with Anyon's description of the "Affluent Professional School" where parents are surgeons, interior designers, corporate lawyers, engineers, and advertising executives. In the affluent professional school, work is a creative activity to be carried out independently. Students are continually asked to express and apply ideas and concepts. Work involves expansion on and illustration of ideas and choice of appropriate methods and materials.⁶⁹ In a math class the teacher asks the class to get their geoboards from the side cabinet, to take a handful of rubber bands, and then to listen to what she would like them to do. She says,

I would like you to design a figure and then find the perimeter and area. When you have it, check with your neighbor. After you've done that, please transfer it to graph paper and tomorrow I'll ask you to make up a question about it for someone. When you hand it in, please let me know whose it is, and who verified it. Then I have something else for you to do that's really fun. (pause.) Find the average number of chocolate chips in three cookies. I'll give you three cookies, and you'll have to *eat* your way through, I'm afraid!⁷⁰

Or consider this example from the "Executive Elite School," where most of the fathers are presidents and vice presidents in major U.S. based multinational corporations. Here,

[the] work is developing one's analytic intellectual powers. Children are continually asked to reason through a problem, to produce intellectual products that are both logically sound and of top academic quality. A primary goal of thought is to conceptualize rules by which elements may fit together in systems, and then to apply these rules.⁷¹

68. Anyon, *supra* note 63, at 76.

69. Anyon, *supra* note 63, at 79.

70. Anyon, *supra* note 63, at 80.

71. Anyon, *supra* note 63, at 83.

“In social studies—but also in reading, science and health—the teachers initiate classroom discussions of current social issues and problems. These discussions occurred on every one of [my] visits, and a teacher told me, ‘These children’s opinions are important—it’s important that they learn to reason things through.’”⁷² Classroom discussions dealt with concrete, social issues like “Why do workers strike?” “Is that right or wrong?” “Why do we have inflation, and what can be done to stop it?” “Why do companies put chemicals in food when the natural ingredients are available?”⁷³ “The executive elite school [was] the only school where bells do not demarcate the periods of time.”⁷⁴ “[C]hildren were sometimes flippant, boisterous, and occasionally rude.”⁷⁵ The teachers tried to bring them “into line by reminding them that ‘it is up to you.’ ‘You must control yourself,’ ‘you are responsible for your work,’ you must ‘set your priorities.’ One teacher told a child, ‘you are the driver of your car—and only you can regulate your speed.’”⁷⁶

Which of these schools did you attend? Which one do your children go to? When I was a first and second grader, on scholarship at Dalton, an elite East Side Manhattan school where classmates came to school in chauffeur driven limousines, we never saw a worksheet, sounded out a word, or took a test. Twelve years later, my three best friends from Dalton were editors at the Harvard Crimson. In third grade, my family moved from the city to Rockland County where many of my public school classmates were working class. We were drilled daily in phonics (the Carden Method) and multiplication tables.

There is a racial story here as well. The most highly touted of the comprehensive programs, programs like Direct Instruction, Success for All, and Open Court are designed for, tested in, marketed to, and adopted primarily by schools serving poor black and Latino children. While the models claim to operate under the assumption that all children can learn and reach high academic performance levels, their design, pedagogic methods, and claims of startling success where gains are still modest reflect a view of poor minority children that resonates with theories positing different learning styles at best, and cultural or genetic deficiencies at worst.

With all the talk of closing the achievement gap and not leaving any child behind, a simple but seldom spoken truth is that black students must achieve in the face of racism. Our society and our schools devalue them by virtue of their social identity as African Americans and it is no wonder that so few of them perform to their full potential. The public conversation about the achievement gap is as old as slavery, when “18th and 19th centur[y] European and American

72. Anyon, *supra* note 63, at 84.

73. Anyon, *supra* note 63, at 84–85.

74. Anyon, *supra* note 63, at 86.

75. Anyon, *supra* note 63, at 86.

76. Anyon, *supra* note 63, at 86.

intellectuals relied on craniotometry [and eugenics] to explain and defend racial hierarchy.”⁷⁷ That conversation has racial meaning still. When the Secretary of Education promotes and praises programs that make black children chant and memorize by rote, when federal bureaucrats tell us our children must be taught to take the test and nothing more, when they hail as miracles schools that raise black children’s test scores above those of other failing schools but still leave them far behind the national norm, I hear echoes of eugenics and Herrnstein and Murray’s resuscitations of that racist pseudoscience in *The Bell Curve*.⁷⁸ I understand these messages against a backdrop of Jim Crow, minstrel shows, the Amos and Andy Show, and a host of historical and contemporary icons and practices that give them meaning. That meaning recites our nation’s ideological belief in black intellectual inferiority. As Dr. Asa Hilliard has observed, the conversation about the racial achievement gap is “filled with student, family, and cultural deficit theories, and proposed minimum competency remedies, reflecting a terrible pessimism about the power of teachers, schools and children.”⁷⁹

The No Child Left Behind Act adopts this ideology, albeit in compassionate conservative disguise. It reiterates the ideology’s message and meaning. It provides financing for its dissemination, and, by what it does and does not do, it shapes our educational practices—the way that black and brown children are spoken to, disciplined, and taught. When children are told to “shut up and sit down,” when the toilets in the bathroom are broken and the classroom ceiling leaks, when there are no gifted or Advanced Placement classes (or when black students are discouraged from taking them), these practices and conditions, like the segregation held unconstitutional in *Brown*, are symbols of racist ideology. They generate feelings of inferiority. Like segregation, they send a message to black and brown poor students about who they are and who they will be.

Debora Meier, the founder of the Central Park East School in East Harlem—a school that showed through its students’ success in college and the workplace that the children of day laborers, garment workers, and welfare recipients could achieve academic success by being treated in public school as if they were graduate students—says that her purpose in founding the school was *not* to close the gap in test scores. “My concern then as now,” she says, “was that few kids in America, and especially few of those attending working-class or low-

77. Charles R. Lawrence, III, *Still Blaming the Victim*, BOSTON REVIEW: A POLITICAL AND LITERARY FORUM, Summer 2003, available at <http://www.bostonreview.net/BR28.3/lawrence.html>.

78. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (arguing whites genetically more intelligent than minorities). But, for a critical response to *THE BELL CURVE*, see CLAUDE S. FISCHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* (1996); STEVE FRASER ET AL., *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (1995).

79. Asa Hilliard, *No Mystery: Closing the Achievement Gap Between Africans and Excellence*, in *YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS* 143 (Theresa Perry, Claude Steele, & Asa Hilliard, III eds., 2003).

income schools, got the kind of education that prepared them to be powerful members of the ruling class. In a democracy, that should be the nonnegotiable central goal of public schooling.”⁸⁰ This is a vision shared by Thomas Jefferson and Horace Mann and John Dewey. It is not an aspiration to power over, but a demand for power shared—an ambition to belong to a community where all are rulers and all children learn the skills, responsibilities, and empathy necessary to that task.

IV. WHAT REAL SCHOOL REFORM WOULD LOOK LIKE

What’s needed to insure no child is left behind is no mystery. Create cultures of excellence and high expectations in schools for black, brown, working class, and poor students—cultures that define success by superior achievement rather than marginal improvement. Recruit and nurture school leaders and teachers who believe in their students and are committed to the project of excellence—scholars, artists, and highly skilled practitioners who believe these students are partners in the scholarly, artistic endeavor. Pay them well, commensurate with the importance of this task and sufficient to compete in the market for those most able and well-prepared. Reduce class size. Provide safe, clean, well-lighted, aesthetically-pleasing school buildings equipped with the latest technology. Spend the money necessary for these things. Money may not be the answer but it is a necessary precondition to all of the things that work. Reinstitute the war on poverty. We leave these children behind long before they reach the classroom. The early experiences and conditions of life and living, including weight at birth, exposure to environmental hazards, hunger, lack of nutrition, and insufficient environmental stimulation necessary for cognitive development, imprison children’s minds and keep them from achieving. Schools may be a good place to locate a variety of services and specialists under one roof—where teachers, pediatricians, epidemiologist, environmental engineers, social workers, and lawyers could provide coordinated advocacy, support, and care.⁸¹

Educate and organize poor and working class communities to insist on excellence in their schools, to demand the resources necessary to that task, to reject the fraudulent reforms of watered-down standards, high stakes testing,

80. Deborah Meier, *quoted in* Jay Matthews, *Seeking Alternatives to Standardized Testing*, WASH. POST, Feb. 17, 2004, *available at* www.resultsforamerica.org/calendar/files/Seeking%20Alternatives%20to%20Standardized%20Testing.pdf.

81. See Paul Tough, *The Harlem Project*, N.Y. TIMES, June 20, 2004 (Magazine), at 44. Tough describes a neighborhood plan that “combines educational, social and medical services. It starts at birth and follows children to college. It meshes those services into an inter-locking web, and then it drops that web over an entire neighborhood.” *Id.*; SCHOOLS AS CENTERS OF COMMUNITY: A CITIZEN’S GUIDE FOR PLANNING AND DESIGN 18-19 (2003) [hereinafter SCHOOLS AS CENTERS] (describing ways schools provide integrated services for families), *available at* http://www.edfacilities.org/pubs/scc_publication.pdf. In one case study, the guide details a partnership in Manhattan between The Ellen Lurie School, known as P.S. 5, and the Children’s Aid Society. SCHOOLS AS CENTERS, *supra*, at 18.

commercial rote-learning programs, and phony “school choice.” We know what excellent schools look like. We know how to reproduce them. The challenge is political. Can we create the political will to change when the achievement gap is a condition of the oppressors’ privilege? Only when we meet that challenge will we truly leave no child behind.